United States Court of Appeals

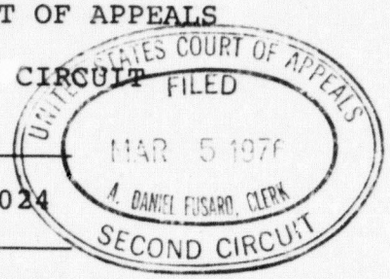
for the Second Circuit

APPENDIX

76-6024

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



No. 76-6024

UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

FREDERIC G. WITHINGTON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Plaintiff-Appellee

On Appeal from the United States District Court for the Southern District of New York

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APPENDIX

BAKER & McKENZIE
Attorneys for Appellant Frederic G. Withington
375 Park Avenue
New York, New York 10022

PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

69 Civ. 200

DATE	PROCEEDINGS
7/10/75	Filed Government's Memorandum in Opposition to Motion to Quash and Vacate the Subpoena Served upon Frederic G. Withington, which included therein the Affidavit of Grant G. Moy, sworn to on June 30, 1975.
5/19/75	Filed Frederic G. Withington's Notice of Motion and Supporting Affidavits in support of Motion to Quash and Vacate Subpoena, which included therein the Affidavit of Frederic G. Withington, sworn to on May 15, 1975 and the Affidavit of Standish Bradford, Jr., sworn to on May 16, 1975.
12/4/75	Filed Memorandum decision of Chief Judge David N. Edelstein denying motion of Frederic G. Withington to quash subpoena.
12/8/75	Filed Memorandum decision of Chief Judge David N. Edelstein denying motion of Felix Kaufman to quash subpoena.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	69 Civ. 200
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	(D.N.E.)

AFFIDAVIT OF GRANT G. MOY, JR.

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

GRANT G. MOY, JR., being duly sworn, deposes and says:

1. I am an attorney in the Antitrust Division, United States Department of Justice, assigned to assist in the prosecution of the above-captioned case. I make this affidavit in opposition to the motion to quash and vacate the subpoena served upon Mr. Frederic G. Withington.

2. Mr. Withington is a Senior Staff Member in the Management Services Division of Arthur D. Little, Inc., a management consulting firm.

3. In May 1974, I spoke by telephone with Mr. Withington. At that time he agreed to appear as a witness for the Government at the trial of this action. Mr. Withington thereupon sent me a copy of his brief resume which identified his formal education and training, his prior experience in the electronic data processing industry,

and his books and other publications in the field. (A copy is attached hereto as Exhibit A.) He was then identified as a trial witness on the list submitted to the Court June 3, 1974.

4. A couple of weeks thereafter, counsel for Arthur D. Little, Inc. requested that Mr. Withington's name be withdrawn from the list of Government trial witnesses. Plaintiff acquiesced in this request and withdrew Mr. Withington's name.

5. On January 20, 1975, plaintiff moved this Court for an order allowing the reinstatement of Mr. Withington to the witness list. The motion was granted and Mr. Withington's name was re-listed.

6. Plaintiff intends to call Mr. Withington as an expert witness to present testimony generally relating to his observations and prior opinions expressed during the period from 1960 through 1972. Plaintiff intends to elicit testimony concerning the nature and structure of the general purpose electronic digital computer systems market, and of the electronic data processing industry in general.

7. Plaintiff will not seek to have Mr. Withington conduct any examinations or experiments, nor to undertake any special studies, to prepare himself for trial.

Grant G. Moy, Jr.
GRANT G. MOY, JR.

Subscribed and sworn to before me
this 20th day of June, 1975.

NOTARY PUBLIC

My commission expires:

LYNWOOD HAYES
Notary Public, State of New York
No. 41-1720625
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1977

Arthur D Little, Inc

FREDERIC G. WITHINGTON

At Arthur D. Little, Inc. since 1960, Mr. Withington has worked with virtually all aspects of data processing systems: their design, applications, markets and effects on the organizations using them. He has worked on the design of computer-based information systems and organizations for a variety of clients, including manufacturing, insurance and public utility companies, financial and educational organizations, and local, state, and federal governments. He has assisted many of the computer and related equipment manufacturers in product and market planning, and has been responsible for a series of annual Arthur D. Little, Inc. studies of the data processing industry: both of individual companies, and of trends in the industry as a whole. He has also participated in the development of several specialized information retrieval and command control systems for agencies of the Federal Government.

Mr. Withington has written three books. The Organization of the Data Processing Function (Wiley, 1972) is for those interested in optimal structuring and management of data processing, and of its fit to the parent organization. The Real Computer - Its Influence, Uses and Effects (Addison-Wesley, 1969) now available in three languages, is an assessment of the changes computers are causing in the behavior and structure of the organizations and individuals using them. The Use of Computers in Business Organizations (Addison-Wesley, 1966) is now in its second edition and fifth printing. It is an introduction to the subject for general management, designed to equip them with the necessary knowledge to make decisions about the employment of computers. He has also contributed chapters to two other books and has published numerous technical papers in a variety of journals.

Prior to joining Arthur D. Little, Inc., Mr. Withington was Eastern Regional Manager of Technical Services for the Burroughs Corporation. In this and previous positions with Burroughs, he was concerned with applications and installation of computer systems, participating in and directing many of the manufacturer's technical support programs. He was also concerned with design and evaluation of new computers. Earlier, he was associated with the National Security Agency as a computer programmer and programming supervisor. He is a graduate of Williams College with a B.A. in physics.

Mr. Withington is a member of the Executive Council of the Society for Management Information Systems, a National Lecturer for the Association for Computing Machinery, and a Contributing Editor of Datamation magazine.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	69 Civ. 200 (D.N.E.)
-against-	AFFIDAVIT
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

FREDERIC G. WITHINGTON, being duly sworn, deposes and says:

1. I am a citizen and resident of the State of Massachusetts employed as a member of the professional staff at Arthur D. Little, Inc. ("ADL"), a consulting firm located at 35 Acorn Park, Cambridge, Massachusetts.

2. I make this affidavit in support of a motion to quash and vacate a civil subpoena dated March 13, 1975. That subpoena (annexed hereto as Exhibit 1) directs me to appear and testify on behalf of the United States of America in a case entitled "United States of America vs. International Business Machines Corporation", Civil Action File No. 69 Civ. 200 [D.N.E.] now pending in the United States District Court for the Southern District of New York. The subpoena was served personally upon me at the offices of ADL.

3. In my capacity as an ADL employee, I function as a management consultant to a wide variety of manufacturers,

sellers and users of electronic computers, one of which is IBM*. While, as an employee of ADL, I have often dealt with IBM in a professional consulting capacity, I have no direct knowledge of the facts upon which the government predicates its case against IBM.

4. As an employer of ADL, I am also primarily responsible for preparing analyses and forecasts of the computer industry based on ADL estimates of the performance of the participants. These analyses and reports are distributed periodically to paying subscribers. The last such analysis, for example, was entitled "The World Computer Industry: 1974-1979" and was distributed in February, 1975.

5. It is my understanding and belief that the government wishes me to function as an expert witness in its case against IBM, and has subpoened me solely in this capacity. Indeed, as early as June of 1974, I was approached by representatives of the Department of Justice with respect to the possibility of my acting as an expert for the United States in the IBM case. At that time, I engaged in a telephone conversation to that effect with Mr. Grant Moy of the Department of Justice. In addition, a personal meeting was arranged at which I conferred

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*I am the author of three books and numerous articles dealing with the computer industry. The books I have authored include: The Organization of the Data Processing Function, published by John Wiley & Sons; The Real Computer, Its Influences, Uses and Effects, published by Addison-Weseley Publishing Co., Inc.; and The Use of Computers in Business Organizations, also published by Addison-Weseley.

at some ~~time~~ length with a Justice Department consultant from Cornell University whose name I do not presently recall. Subsequent to these events, the Department of Justice formally requested that I provide my expert services to it in aid of its prosecution of the civil action against IBM. That request, contained in a letter dated June 12, 1974 from Lewis Bernstein, chief of the Special Litigation Section of the United States Department of Justice, to me is annexed hereto as Exhibit 2. Standish Bradford, senior counsel of ADL, responded to Mr. Bernstein's letter in his letter to Mr. Bernstein dated June 17, 1974. Mr. Bradford's letter, annexed hereto as Exhibit 3, explained that, for various reasons, ADL objected to my participation as an expert for the government in the matter.

6. IBM has been a client of ADL for many years. Aside from the normal conflict-of-interest which would exist in any situation whereby I was compelled to testify for the government, I am advised that ADL, in some capacity, is actually participating in the defense of the government's action against IBM.

7. I do not wish to testify for the government. I view such testimony to be a conflict of interest with respect to my obligations to my employer. I further believe that the government wishes my testimony only with respect to the underlying techniques, assumptions and thought processes which resulted in the compilation of the estimates and analyses described in paragraph 4 above. As such, the government is seeking the very

core of my expertise which I do not wish to provide and which I consider to be a proprietary asset available solely to my employer or to those for whom I wish to work. In addition, to the extent the government wishes to inquire into the identification of any documents or source material upon which the surveys are compiled, the identity of such documentation and source material constitutes, I believe, proprietary information belonging to ADL.

Frederic G. Withington
FREDERIC G. WITHINGTON

Sworn to before me this
15th day of May, 1975

Robert B. Davidson
Notary Public

ROBERT B. DAVIDSON
Notary Public, State of New York
No. 31-4500636
Qualified in New York County
Commission Expires March 30, 1977

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.

UNITED STATES OF AMERICA, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant. } 69 Civ. 200 [D.N.E.]

To Frederic Withington
Acorn Park
Cambridge, Massachusetts

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of New York at U. S. Court House, Rm. 110 in the city of New York, New York, on the 19th day of May, 1975, at 9:00 o'clock A. M. to testify on behalf of the United States of America in the above entitled action.

RAYMOND F. BURGHARDT, Clerk

March 13, 1975

By F. P. CASTELLANO, Deputy Clerk.

Charles R. Esherick
Attorney for Plaintiff
U. S. Department of Justice
Address
Washington, D. C. 20530
Tel.: (202) 739-2592

RETURN ON SERVICE

Received this subpoena at on
I served it on the within named at
by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.

Dated , 19

By

Service Fees
Travel $
Services
Total $

Subscribed and sworn to before me, a this day of , 19

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

D. T. Libby

EXHIBIT 1

10 A

TO: Witnesses subpoenaed DATE: March 13, 1975

FROM: Charles R. Esherick FILE: 60-235-38

SUBJECT: U. S. v. ITT

All witnesses for the Government have been subpoenaed for May 19, 1975. You will not be required to appear on that date. Counsel for the Government will be in contact with you before that date to inform you approximately when your appearance will be necessary. Later, the same counsel will call you to give you a more precise timing schedule.

Should you have any questions concerning your appearance as a witness at trial, please call Mr. Charles R. Esherick at (Area Code 202-739-7492 or 2592).

The purpose of this notice is to inform you that the Government intends to inconvenience you as little as possible and please be assured that Government Counsel will do their best to that end consistent with their trial schedules and responsibilities to the Court.

DOJ—1973-04

EXHIBIT 11

11 A

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

TEK:LB
60-235-38

June 12, 1974

Frederick G. Withington
Consultant
Arthur D. Little, Inc.
Acorn Park
Cambridge, Massachusetts 02140

Dear Mr. Withington:

This is a letter of intent to engage your services to testify in the case of U.S. v. IBM and to assist in the preparation prior to the trial now scheduled for October 7, 1974.

We request that you limit your testimony to information based on your firsthand knowledge gathered from your experience as a consultant on projects in which you have personally participated and from writings which you have completed during the period January 1, 1960 to June 30, 1973 covering the period 1960-1972.

Compensation will be at your normal rate to the government for the time and costs of your efforts on this case.

Sincerely yours,

BRUCE B. WILSON
Acting Assistant Attorney General
Antitrust Division

By: Lewis Bernstein
Chief
Special Litigation Section

EXHIBIT 2

bcc: Weedon
Withington
Russell

12 A

Arthur D. Little, Inc. ACORN PARK · CAMBRID

June 17, 1974

Lewis Bernstein, Esq.
Chief, Special Litigation Section
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Bernstein: Re: U.S. v. IBM

Your letter of intent of June 12, 1974, has been brought to our attention along with your request to use Mr. Frederic G. Withington as an expert witness in the above proceedings. Unfortunately, we have already been approached by IBM and have agreed to appear for them both as an expert witness and as a witness with respect to work performed for them in the past. We therefore do not feel it appropriate to act as an expert witness for you in the same proceeding and would appreciate your removing Mr. Withington's name from your list of witnesses. This conflict came to management's attention only recently; otherwise we would have notified you at an earlier date.

We very much appreciate your offer and hope that we can be of service at some other time.

Very truly yours,

Standish Bradford, Jr.
Assistant General Counsel

Jb

cc: Thomas D. Barr, Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, N. Y. 10005

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	69 Civ. 200 (D.N.E.)
Plaintiff,	:	
-against-	:	AFFIDAVIT
INTERNATIONAL BUSINESS MACHINES CORPORATION,	:	
Defendant.	:	

STATE OF MASSACHUSETTS)
) ss.:
COUNTY OF)

STANDISH BRADFORD, JR., being duly sworn, deposes and says:

1. I am a citizen and resident of the State of Massachusetts and I am employed as senior counsel of Arthur D. Little, Inc. ("ADL").

2. I make this affidavit in support of the motion to quash and vacate a certain civil subpoena served upon an ADL employee, Mr. Frederic G. Withington, which subpoena directed him to appear and testify on behalf of the United States of America in a case entitled "United States of America vs. International Business Machines Corporation", Civil Action File No. 69 Civ. 200 (D.N.E.) now pending in the United States District Court for the South District of New York.

3. This not the first time that the United States has attempted to gain the assistance of Mr. Withington in prosecuting its case against IBM. The first such formal attempt came in a letter to Mr. Withington dated June 12, 1974 from

Lewis Bernstein, Chief, Special Litigation Section, U.S. Department of Justice. That letter requested Mr. Withington's services as an expert in the IBM matter. My response, on behalf of ADL, rejected the government's request for several reasons. The aforesaid correspondence is annexed to the affidavit of Mr. Withington, which is also being submitted in support of the instant motion.

4. IBM is presently a client of ADL, and ADL is performing services for IBM under a number of contracts. Therefore, ADL management does not believe it to be proper or appropriate for Mr. Withington to appear as an expert witness on behalf of the Justice Department in this proceeding.

5. I believe that the United States seeks Mr. Withington solely as an expert witness and not as an individual having any first-hand knowledge of the facts surrounding the litigation.

6. I believe that the government seeks to know the underlying factual assumptions relating to the preparation of certain analyses and estimates compiled by Mr. Withington and distributed by ADL to a limited number of subscribers. ADL considers these analyses and estimates (as well as any information relating to their preparation) to be proprietary. In addition, much of the aforesaid information was gathered pursuant to contracts with ADL clients other than IBM, which contracts often provide that the information developed by ADL in the course of its performance shall be proprietary to those clients. Permitting the Justice Department or any other governmental agency to compel production of such information, whether by expert testimony or otherwise, would damage ADL's relationship with its clients

and would hamper ADL's ability to enter into or obtain similar contracts in the future.

Standish Bradford
STANDISH BRADFORD

Sworn to before me this
16th day of May, 1975

Martha Cotton
Notary Public
MARTHA COTTON, Notary Public
My Commission Expires May 29, 1981

Cobb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

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69 Civ. 200 (DNE)

MEMORANDUM

#43476

EDELSTEIN, Chief Judge:

Frederic G. Withington, a nonparty to this antitrust action between the United States and International Business Machines Corporation (hereinafter IBM), has moved this court "for an Order, pursuant to Rule 45 of the Federal Rules of Civil Procedure and Section 2304 of the Civil Practice Law and Rules of the State of New York," [1] quashing and vacating a subpoena directing him to appear and testify on behalf of the United States in the above-captioned proceeding.

Although the motion papers fail to isolate the grounds for the requested order, the three supporting affidavits and the accompanying memorandum of law reveal the essential argument: Mr. Withington claims that he is being summoned to testify not as an individual with first-hand knowledge of the facts of this litigation but rather as an expert witness and that, as an unwilling expert, he may not

be compelled to testify. Mr. Withington asserts that the information which he understands the Justice Department will seek to elicit from him at trial is proprietary and should be protected from involuntary revelation. Additionally, while movant's memorandum of law fails even to mention this assertion, it is argued in the accompanying affidavits that certain unspecified contractual relationships that exist between Mr. Withington's current employer, Arthur D. Little, Inc. (hereinafter ADL) and IPM would create a conflict of interest should Mr. Withington be compelled to testify on behalf of the plaintiff.

The Department of Justice does not dispute that it intends to call Mr. Withington to testify as an expert. It contends, however, that this court has the power to compel Mr. Withington to testify on plaintiff's behalf and that such power should be exercised since "Mr. Withington's knowledge and expertise in the [electronic data processing] industry would provide relevant information on the issues in this action." Memorandum in Opposition to Motion to Quash and Vacate the Subpoena Served upon Frederic G. Withington, at 4. For the reasons set forth below, the court has determined that the instant motion must be denied.

The law to which this court must adhere does not support Mr. Withington's central contention that an unwilling expert may not be compelled to testify. In Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973), uncited by movant, the Second Circuit was confronted with the argument that the requirement of unavailability prevented the receipt of the prior testimony of certain expert witnesses notwithstanding the fact that the witnesses lived beyond the reach of the court's subpoena power. It was claimed that the rule that a court's lack of power to compel attendance at trial is sufficient proof of unavailability is inapplicable with respect to expert witnesses whose "opinions could under no circumstances be obtained through court process." 474 F.2d at 536. In disposing of this somewhat curious argument, Judge Friendly, writing for the majority, conclu-

> Carter-Wallace's reliance on the court's alleged lack of power to compel expert testimony is misplaced. The weight of authority holds that, although it is not the usual practice, a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed, Boynton v. R. J. Reynolds Tobacco Co., 36 F.Supp. 593 (D. Mass. 1941); United States v. 284, 392 Square Feet of Floor Space, 203 F.Supp. 75 (E.D.N.Y. 1962) (dictum); see 4 Moore, Federal Practice ¶26.66 [1], at 26-469 (1972); 8 Wigmore [Evidence] §2203(2)(c) [3d ed. 1940].

Id. To this rejection by the Court of Appeals of Mr. Withington's essential argument, it need only be added that an even stronger basis may be said to exist in the case at bar for recognizing the court's power to compel expert testimony than existed in Carter-Wallace. This is not an attempt by a litigant in a private controversy to support its case through

the assistance of an unwilling expert. Instead, here is involved an attempt by the United States to summon a member of the public to testify in a major government antitrust case, a case which, by definition, greatly affects the commonweal. See Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Phila., 262 Pa. 439, 105 A. 630 (1918).

Ignoring Carter-Wallace, Mr. Withington cites People ex rel. Kraushaar Bros. & Co. v. Thorpe, 296 NY 223, 72 N.E. 2d 165 (1947) for the proposition that in New York an expert cannot be subpoenaed to testify against his will. It is then asserted that under Rule 43(a) of the Federal Rules of Civil Procedure, Kraushaar should control the disposition of this motion. [2] This court cannot agree. The Second Circuit's opinion in Carter-Wallace, issued twenty-five years after Kraushaar and concerning an appeal from a trial in the Eastern District of New York, erases all doubts that this court, sitting in New York, has the power to compel an expert to testify. Further consideration of Kraushaar and other New York cases relying upon it is, therefore, unnecessary.

During the pendency of this motion, the Federal Rules of Evidence became effective. A careful examination of those rules, however, reveals that they leave unaltered the conclusion, compelled by Carter-Wallace, that this court has the authority to compel Mr. Withington to comply with the subpoena.

It is true that Carter-Wallace did not address an alleged conflict of interest which might result from compelling

an expert witness to testify. However, Mr. Withington's reliance on this argument to thwart plaintiff's subpoena is misplaced. This argument, not even mentioned in the "supporting" memorandum of law, [3] is cast in the affidavits in vague and conclusory terms. Thus Mr. Withington claims that "aside from the normal conflict of interest" which would exist if he was compelled to testify since "IBM has been a client of ADL for many years," such testimony would be a "conflict of interest with respect to [his] obligations to [his] employer" since Mr. Withington has been "advised that ADL, in some capacity, is actually participating in [IBM's defense]." Withington affidavit at 3 (emphasis supplied). To this statement by Mr. Withington, counsel for ADL adds in his affidavit that:

> IBM is presently a client of ADL, and ADL is performing services for IBM under a number of contracts. Therefore, ADL management does not believe it to be proper or appropriate for Mr. Withington to appear as an expert witness on behalf of the Justice Department in this proceeding.

Bradford affidavit at 2 ¶4.

Apart from the overgeneralized and indefinite nature of Mr. Withington's assertions concerning unspecified contracts and undefined relationships, the court is simply not persuaded that Mr. Withington's argument relating to an alleged conflict of interest is a sufficient ground for denying the court access to his testimony, the precise subject-matter of which is not even yet known. Nor, it appears, would Professor Moore accept

such an argument. In a section devoted to pre-trial discovery from adverse party's experts, Professor Moore restates the "general American rule" that an expert may be compelled to testify at the trial on matters of expert opinion. 4 J. Moore, Federal Practice ¶26.66[1] at 26-469 (2d ed. 1975).

All that is being required of Mr. Withington, who, as the above-quoted statements suggest, is not personally involved in IBM's defense, is that he perform his duty to testify, impartially, in a case of national significance. That his employer may have enjoyed certain business relationships with defendant now or in the past should not insulate him from this obligation. Were this court to conclude otherwise, a party to a lawsuit involving highly specialized technology could, by the employment of experts, effectively insulate itself from the highly probative testimony that those experts might provide. Mr. Withington may not be the only qualified expert in the field of computers. Nevertheless, the size, complexity and significance of this case create a need to obtain all the relevant testimony that the parties, through their witnesses, can provide. In recognition of this need, the court has permitted the parties to engage in a vast, perhaps unprecedented, discovery program imposing burdens on hundreds of non-parties. Additionally, scores of individuals will be summoned to testify at the trial, in many cases at a considerable sacrifice of time and expense to the witness and the

company he may represent. That the court has permitted the parties to impose these burdens reflects the court's firm belief that as the public will benefit from a just and expeditious resolution of this case, so must the public share in the burdens that such a resolution involves. This same belief constrains the court to conclude that the burden Mr. Withington is being asked to bear should be upheld.

Motion denied.

/s/
David N. Edelstein
Chief Judge

Dated: New York, New York
December 11, 1975

FOOTNOTES

1/ Explaining that Fed. R. Civ. P. 45 "is not absolutely clear with respect to the Court's power to quash a civil subpoena requiring testimony only," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 3,n.1, Mr. Withington cites section 2304 of the Civil Practice Law and Rules of the State of New York as support for the procedure he has employed in this motion. As authority for this reference to New York law, movant cites Rule 15 of the Civil Rules for the Southern and Eastern Districts of New York. That local rule provides that:

> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.

This court believes, however, that reliance on the N.Y.C.P.L.R. is unnecessary. Since this court has the inherent power to vacate the subpoena served on Mr. Withington and issued from this court, see 5A J. Moore, Federal Practice ¶45.05[2] at 45-37 (2d ed. 1975), it would seem that a motion to quash the subpoena may be made. In any event, Local Civil Rule 15 expresses a clear preference for reliance on parallels or analogies in the Federal Rules before reference is made to New York procedure. The abundantly clear provisions of Fed. R. Civ. P. 45 with regard to a motion to quash a subpoena duces tecum provide the compelling analogy envisioned by Local Civil Rule 15 and permit the procedure invoked by Mr. Withington without reference to section 2304 of the N.Y.C.P.L.R.

2/ With the adoption of the Federal Rules of Evidence in 1975, subdivisions (b) and (c) of Rule 43 were abrogated and subdivision (a) was substantially amended. The effective date of those amendments occurred during the pendency of this motion. However, in light of this court's determination, as indicated in the text, infra, that the new Rules of Evidence do not alter the conclusion that this court has the power to compel Mr. Withington to testify, the court has not reached the question of whether Rule 43(a) or the new Rules of Evidence, in favor of which Rule 43 was amended, "control" the disposition of this motion.

3 / Although cited for a distinctly different proposition of law than one involving an alleged conflict of interest, Mr. Withington does refer in his memorandum to Boynton v. R.J. Reynolds Tobacco Co., 36 F.Supp. 593 (D. Mass. 1941) wherein, after determining that it had the authority to compel an adverse party's expert to submit to a deposition, the court briefly addressed the possibility that the expert would be placed in a conflict of interest. Before relying on the language in that case, however, it must be noted that Boynton, like many of the cases cited by Mr. Withington in his memorandum of law, concerned an attempt to obtain discovery from an opponent's expert. As Professor Moore indicates, such cases are distinguishable from those concerning attempts to subpoena an expert to testify at trial. 4 J. Moore, Federal Practice ¶26.66[1] at 26-470 (2d ed. 1975). In any event, the court in Boynton explicitly indicated that its decision denying the deposition of the expert was simply an exercise of its discretion.

#2463 P Memo decision Kaufman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

#43495

69 Civ. 200 (DNE)

MEMORANDUM

EDELSTEIN, CHIEF JUDGE:

As stated by this court on the record, Tr. at 8516, the within motion is denied. The essential arguments raised by Mr. Kaufman are substantially identical to those raised by one Frederic G. Withington in a motion to quash a subpoena directing him to appear and testify as an expert on behalf of the United States in this case. In a memorandum decision entered on December 4, 1975, the court denied Mr. Withington's motion after addressing the relevant questions and concluding, first, that this court could compel Mr. Withington to testify, as confirmed by the Second Circuit in Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973), and, second, that such authority should be exercised in that case. The reasons and principles set forth in the court's memorandum denying Mr. Withington's motion requires the same result with respect to the instant application.

Mr. Kaufman's assertion that the "showing" required by the Second Circuit in Carter-Wallace as a condition to using prior recorded expert testimony "appl[ies] a fortiori to the expert newly summoned against his will," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 9, is so specious as not to warrant extended discussion. It is enough to quote in full the language in Carter-Wallace to which Mr. Kaufman refers and which he partially reproduces in his memorandum. Judge Friendly stated:

> Moreover, even the unavailability of a particular expert witness should not without more allow the use of his prior testimony in a second action. It must be recognized that the general preference of the federal rules, as expressed in F.R.Civ.P. 43(a), is for oral testimony so that there will be an opportunity for live cross-examination and observation of the demeanor of the witness. While the use of previous testimony is a well-established exception to this rule, it is an exception based on the necessity of using the prior testimony when the alternative is loss of that testimony entirely. See 5 Wigmore, supra, § 1402, at 148. When the ordinary witness is unavailable, his unique knowledge of the facts will be lost unless the use of his prior testimony is allowed. But the expert witness generally has no knowledge of the facts of the case. Instead, he is called upon to express a professional opinion upon the facts as they are presented to him, often expressing his opinions in the form of answers to hypothetical questions. Thus, even if one particular expert is unavailable, there is no need to use his previous testimony to prevent the loss of evidence, because there will usually be other experts available to give similar testimony orally. It seems to us, therefore,

> that before the former testimony of an expert witness can be used, there should be some showing not only that the witness is unavailable, but that no other expert of similar qualifications is available or that the unavailable expert has some unique testimony to contribute.

Id. (emphasis supplied). In light of this language, it is clear beyond doubt that the "showing" Judge Friendly required was one prompted by the concerns inherent in the use of prior recorded testimony, concerns which are totally distinct from those involved in compelling an expert to assume the stand where he would be available for direct and cross-examination.

Mr. Kaufman's assertions with regard to the new Federal Rules of Evidence similarly fail to support his attempt to quash plaintiff's subpoena. After stating that "there is no Rule which deals directly with a Party's right to obtain the testimony of experts," Memorandum of Law in Support of Motion to Quash and Vacate Subpoena at 10, Mr. Kaufman refers the court to Rule 706(a) which provides a procedure for the appointment by the court of experts. While it is true, as Mr. Kaufman points out, that that Rule states that "[a]n expert shall not be appointed by the court unless he consents to act," Mr. Kaufman's reliance on that statement is misplaced. First, the "appointment" envisioned by Rule 706(a) contemplates requiring the expert to perform significant duties, such as preparing "findings," in addition to or in lieu of testifying at the trial. Since the court in Carter-Wallace would not permit such additional duties to be imposed on an unwilling

expert, 474 F.2d at 536, the requirement of consent contained in Rule 706(a) is not inconsistent with the ruling by the Second Circuit in Carter-Wallace. Second, as plaintiff's answering memorandum indicates (at 4), Mr. Kaufman fails to acknowledge subdivision (d) of Rule 706 which at least suggests that the requirement of consent in subdivision (a) does not extend to a party's attempt to subpoena an unwilling expert. Subdivision (d) provides:

> Parties' experts of own selection. Nothing in this rule [706] limits the parties in calling expert witnesses of their own selection.

Like Mr. Withington, Mr. Kaufman asserts that compelling him to testify for the United States would create a conflict of interest since his employer, Coopers & Lybrand, is performing certain unspecified services for IBM. In the preliminary statement to his memorandum of law, Mr. Kaufman explains that in September of 1974 Coopers & Lybrand agreed to perform services in preparation of IBM's defense in a separate private action, California Computer Products, Inc. v. IBM, Civil Action No. 73-2331 (N.D. Cal.) and that, thereafter, Coopers & Lybrand was engaged by Cravath, Swaine & Moore, IBM's counsel in this case, "to perform certain services in connection with the preparation of IBM's defense in the present action." Kaufman affidavit, at 3. Further, it is asserted that Coopers & Lybrand "has been negotiating with IBM about a possible engagement to perform certain consulting services on behalf of an IBM subsidiary in a matter unrelated to this action." Id. (emphasis supplied).

In evaluating Mr. Kaufman's claim, the court must consider not only the value of his testimony to this complex and extraordinary case, see infra, but also several influential factors revealed by the papers submitted on this motion. First, apart from a general familiarity due to his supervisory capacity as National Director of Management Consulting Services, Mr. Kaufman concedes that he has "no direct personal involvement" in the work performed by Coopers & Lybrand for IBM in its defense in this or the California case. Kaufman affidavit, at 3. Moreover, and of particular significance, IBM and its counsel, to whom Mr. Kaufman asserts the "duty of loyalty" is owed, have indicated both to Mr. Kaufman and to this court that they do not "wish to assert [in their] behalf that Mr. Kaufman is in any way precluded from testifying on behalf of the Government because of the relationship with IBM and its counsel which Coopers & Lybrand has undertaken." Letter from Thomas D. Barr (counsel for IBM) to Powell Pierpoint (counsel for Kaufman), dated September 12, 1975 (filed December 8, 1975). Indeed, as IBM points out in that letter, a copy of which is annexed hereto, in response to plaintiff's motion to add Mr. Kaufman's name to its witness list defendant filed an affidavit consenting to the entry of such an order.

In addition to these factors, Mr. Kaufman's allegations as to a conflict of interest must be weighed against two representations contained in plaintiff's answering memorandum of law. First, plaintiff asserts that Mr. Kaufman will be called to testify "concerning his observations and prior opinions

expressed during the period 1960 through 1972." Memorandum in Opposition to Motion to Quash and Vacate the Subpoena Served upon Felix Kaufman, at 5. This time frame, of course, terminates before Mr. Kaufman's employer undertook for IBM whatever services are referred to in the Kaufman affidavit. Additionally, plaintiff asks the court to note that:

> Coopers & Lybrand has in the past performed a significant amount of consulting services for the Department of Justice and other Government agencies . . . . The 'duty of loyalty' expressed by Dr. Kaufman and implied by Mr. Amnowitz in their affidavits did not deter Coopers & Lybrand from being retained by IBM counsel to assist in the defense of this case in spite of its past relationships with the Government, and one month after Dr. Kaufman was subpoenaed to appear as a Government witness. This 'duty of loyalty' cannot and should not preclude Dr. Kaufman's testimony concerning prior opinions formed as an impartial observer of the data processing industry.

Id. at 5-6.

In light of these factors, the court cannot accept Mr. Kaufman's allegations with regard to an alleged conflict of interest -- a "conflict" that does not even appear to concern IBM.

Having considered Mr. Kaufman's arguments in the context of this exceptional case, the court has determined in the exercise of its discretion that Mr. Kaufman should obey plaintiff's subpoena. A self-described "expert with respect to EDP," Kaufman affidavit, at 2, Mr. Kaufman was, prior to 1960, Cooper & Lybrand's National Director of EDP, acting primarily as a consultant in the area of EDP. Since that time

he has been Regional and then National Director of Management Consulting Services. Accordingly, his testimony, like that of Mr. Withington, [1] has promise to be highly productive and of assistance to the court in the trial of this case.

David N. Edelstein
Chief Judge

Dated: New York, N. Y.
December 8, 1975

[1] Mr. Withington, an employee of Arthur D. Little, Inc., a well-known consulting firm, described his function as "a management consultant to a wide variety of manufacturers, sellers and users of electronic computers . . . .". Withington Affidavit at 1-2.

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CABLE ADDRESSES
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September 10, 1975

U. S. v. IBM

Dear Mr. Pierpoint:

I have just read your papers dated September 2, 1975, seeking to quash the trial subpoena served on Felix Kaufman of Coopers & Lybrand in the above case. I particularly write because of the references in those papers to a conflict between Coopers & Lybrand's obligations to IBM and Mr. Kaufman's possible testimony in behalf of the Government.

I have been in charge of this case since its inception and throughout much of that time have used Price Waterhouse & Co. as accountants to assist us. In respect of two pending cases--California Computer Products Corporation v. IBM and Sanders Associates, Inc. v. IBM--Price Waterhouse has been unable to act for counsel for IBM because of prior relationships with those two plaintiffs. In each of those cases IBM counsel, first in California and then in Concord, New Hampshire, have retained Coopers & Lybrand. Subsequent to those retainers, my firm retained Coopers & Lybrand, particularly in connection with the possible testimony at trial here of officers of California Computer Products Corporation and Sanders Associates, Inc. I should say that my firm has some general responsibility both for the California Computer and Sanders Associates cases and, of course, constantly consults with counsel for IBM in those cases.

I certainly understand why Coopers & Lybrand and Mr. Kaufman do object to having his services subpoenaed by the plaintiff and believe that your motion on that ground is sound. I also understand why, as a general proposition, Coopers & Lybrand does not wish to be involved on both sides

of any pending litigation or to act inconsistently with the interests of any of its clients.

However, I want you to know that neither we nor IBM wish to assert on our behalf that Mr. Kaufman is in any way precluded from testifying on behalf of the Government because of the relationship with IBM and its counsel which Coopers & Lybrand has undertaken. I should also call to your attention that on January 26, 1975, we filed an affidavit consenting to the entry of an order granting the motion of the plaintiff to add Mr. Kaufman's name to the witness list for the second time. Of course, we did so at that time with the knowledge that Coopers & Lybrand was already working for IBM in the California Computer case and believing that there was no conflict engendered because of that work. In fact I have a vague recollection that I informed plaintiff's counsel at the time that Coopers had accepted an engagement in the California Computer case.

I want to apologize for not having focused upon this matter before today, but I hope you will understand that since the motion was not directed against us, but rather against the plaintiff, it did not immediately reach the top of my reading pile. I recognize, of course, that our position should be brought to the Court's attention promptly and that can be done by memorandum from you or from me or by furnishing the Court a copy of this letter, as you please. Perhaps after you have had a chance to read this letter you might give me a call and we could discuss the best way to do that.

Sincerely,

Tom Barr

Thomas D. Barr

Powell Pierpoint, Esq.,
Messrs. Hughes Hubbard & Reed,
One Wall Street,
New York, N. Y. 10005

X

BY HAND